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No. 95-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HUGHES AIRCRAFT COMPANY,
Petitioner,

v.

UNITED STATES *ex rel.* SCHUMER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR ELECTRONIC INDUSTRIES ASSOCIATION, NATIONAL SECURITY INDUSTRIAL ASSOCIATION, AND SHIPBUILDERS COUNCIL OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

The Electronic Industries Association is a national organization of more than 1200 companies involved in the development and production of televisions, radios, computers, telecommunications devices, radars, avionics, and other military and commercial electronic equipment. The National Security Industrial Association is a national organization of more than 300 manufacturing, research, and service companies from all segments of industry that provide

goods and services in support of the national security needs of the United States. The Shipbuilders Council of America is a voluntary, nonprofit trade association founded in 1920 to promote a sound private shipbuilding and ship-repair industry in the United States; to promote an adequate mobilization potential of privately owned shipbuilding, ship repair, and allied industry for availability during national emergencies; and to afford a means of cooperation between government and industry on matters of national concern. Amici's members annually perform billions of dollars of work for government agencies pursuant to thousands of contracts.

Because much of their work involves government contracts, amici's members are exposed to the possibility of suits initiated by private individuals pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. §§ 3729-3733. Many of amici's members have already been defendants in such suits, which are frequently meritless. Even when the lawsuit has no merit, however, qui tam litigation is extremely burdensome and imposes public dishonor on a defendant through the accusation, in the name of the United States, that it has committed fraud against the government. The qui tam provisions expose companies to these burdens at the whim of any private citizen acting from the motivation of personal enrichment.

The decision below will increase the burdens already imposed by the statute. Congress intended the qui tam provisions to afford citizens an incentive to come forward with information of fraud that would otherwise not come to light. Disregarding this purpose, the Ninth Circuit ruled that companies can be subjected to qui tam lawsuits brought by their employees even if the employees learn of possible

misconduct from the Government. This decision exposes amici's member companies to the possibility of meritless suits asserted after the Government has investigated the same allegations and determined that a lawsuit is inappropriate. Accordingly, amici have a strong interest in the issues presented in this case, and we believe the Court would benefit from their views. In the interest of brevity, amici address only some of the issues presented in the petition, relying entirely on petitioner's discussion of the other issues.

Both petitioner and respondent have consented to the filing of this brief, and letters reflecting these consents have been lodged with the Clerk of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents several important questions arising out of the 1986 amendments to the False Claims Act. Those amendments have caused an explosion in the volume of qui tam litigation, one that shows no sign of abating. Qui tam filings have risen steadily from 33 in 1987 to 131 in 1993 to 274 in 1995. D.O.J. Release 95-542 (Oct. 18, 1995) (1995 WL 614572). That growth is not caused by an increase in the number of false claims filed with the government; rather, it reflects a growing awareness by citizens, notably lawyers, of the possibility of obtaining a substantial private recovery by suing government contractors in the name of the United States.

This case is representative of the most pernicious feature of this litigation explosion -- the numerous meritless suits in which the government declines to intervene but which nonetheless are pursued to the end by private plaintiffs who are eager to take a chance at hitting the jackpot, or at least wearing down the defendant into agreeing to a nuisance

settlement. Unlike the government, which has a strong institutional interest against pursuing meritless litigation, these plaintiffs are not inclined to abandon their lawsuit merely because the defendant has done nothing wrong.

Then Assistant Attorney General Stuart Gerson detailed some of the abuses of the qui tam provisions in testimony before Congress in 1992. He stated that many qui tam suits are "frivolous," presenting "no evidence, no information based on personal knowledge, or are 'kitchen sink' complaints containing every conceivable broad allegation without any specific evidence whatsoever." False Claims Act Technical Amendments of 1992: Hearing on H.R. 4563 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee of the Judiciary, 102d Cong., 1st Sess. 24 (1992) (statement of Stuart M. Gerson, Assistant Attorney General, Civil Division, Dept. of Justice). Many of these suits were brought by disgruntled former employees attempting to use insubstantial False Claims Act allegations as a way of buttressing a wrongful termination claim that was the true controversy. *See id.* at 28.

The virtues of qui tam suits have been extolled on the ground that they have led to substantial monetary recoveries for the government, but that benefit is rarely found in cases like this one, where the government does not join the litigation. Although the government declines to intervene in most of the cases it investigates, those lawsuits account for only 1.4% of the total recovery in qui tam cases. D.O.J. Release 95-542, *supra*; *see* Hearing on H.R. 4563, *supra*, at 25-26. Despite their lack of merit, such suits place a severe burden on the resources of the judicial system and of innocent defendants because the claims tend to be fact-

intensive ones that a court cannot resolve without giving the plaintiff the opportunity to pursue extensive discovery.

The issues presented in this case are central to whether many of these unjustified lawsuits can be maintained, and it is important that this Court act expeditiously to correct the lower court errors that have contributed to the unfortunate proliferation of such suits.

A. Of particular importance is the scope of the "public disclosure" provision of the Act, which prohibits qui tam suits "based upon the public disclosure of allegations" in the news media or in specified government proceedings unless the suit is brought by an "original source of the information." 31 U.S.C. § 3730(e)(4)(A). The Ninth Circuit held that this qui tam action was not barred even though the government had informed innocent Hughes employees, as well as employees of another company, of the alleged fraud in the course of an administrative audit. But the statutory terms make clear that disclosure of allegations to any member of the public, including contractors' employees, in the course of a government investigation constitutes a "public disclosure." The Court should grant certiorari in order to reject the ill-founded policy-based interpretation of the Ninth Circuit and confirm the Second Circuit's ruling that a qui tam plaintiff may not maintain an action based upon a government investigation that was disclosed to the defendant's innocent employees. *See United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992).

B. The Court should also grant certiorari to resolve the lingering issue of the retrospective effect of the "public disclosure" provision, which was instituted in the 1986

amendments. The Ninth Circuit incorrectly applied that provision retroactively, even though retroactive application exposes companies to liability in qui tam suits that they could not have contemplated when the conduct in question occurred and eliminates a defense that was available at the time. The Ninth Circuit reached this conclusion by ignoring a decision of a sister circuit and misinterpreting this Court's decision in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). This issue will persist for many years, and a decision by this Court will eliminate much unnecessary future litigation.

C. Finally, the Court can also eliminate future litigation by taking this opportunity to resolve the recurring issue of the constitutionality of the qui tam provisions, which are not sustainable under this Court's precedents concerning separation of powers principles, the Appointments Clause of the Constitution, art. II, § 2, cl. 2, and the requirements for standing imposed by Article III of the Constitution.

ARGUMENT

A. Government Disclosure of Information to "Innocent" Company Employees During an Investigation Constitutes a "Public Disclosure" That Bars an Individual From Asserting a Subsequent Qui Tam Action Based upon That Information.

Under the 1986 amendments to the False Claims Act, a court cannot exercise jurisdiction over a qui tam action that is:

> based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). No provision of the False Claims Act has generated more litigation, comment, and judicial confusion than this "public disclosure" bar, and the courts have adopted widely divergent views on virtually all significant issues that have arisen concerning its interpretation. *See* Pet. 9-10, 11 n.3, 14 n.4, 16-18. Amici urge the Court to curb some of the uncertainties facing government contractors by resolving the issues of interpretation presented in this case.

Hughes argued below that this action should be dismissed because it was based upon information that employees of Hughes and its prime contractor Northrop received from administrative audits conducted by the government. Pet. App. 8a. But the Ninth Circuit held that a government disclosure of allegations of misconduct to employees who were not involved in the alleged misconduct is a "release of information within a private sphere," *id.* at 9a, not a "public disclosure" within the meaning of the statute. *Id.* at 8a-11a. This decision directly conflicts with better-reasoned authority in the Second Circuit, *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322-23 (2d Cir. 1992), *see* Pet. 11-15, and it also diverges from the statutory text and undermines the policies underlying the statute.

It is unreasonable to conclude that a disclosure of allegations of misconduct to members of the public in one of the ways specified in the statute is not a "public disclosure." Nothing in the statute suggests that a disclosure must be broadly disseminated to any particular number of individuals,

or to any particular categories of individuals, in order to be deemed "public." To the contrary, the sorts of "public disclosures" identified in the statute contemplate disparate degrees of dissemination to different groups of individuals. Broadcasts in the "news media" may be disseminated widely to the nation at large; Government Accounting Office reports will likely be read by only a few members of the public; and disclosures in administrative audits and investigations will likely involve only a few specific individuals. Under the statute, however, each of these disclosures ordinarily constitutes a "public" disclosure sufficient to bar a qui tam action based thereupon, regardless of the number or identity of individuals who receive the information.

A principal goal of the 1986 amendments was to provide additional incentives for whistleblowers to bring new information to the government concerning fraud, while continuing to ban "parasitic" lawsuits based upon information already in the public domain. *See Doe*, 960 F.2d at 321-22; *see also* S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266-67; H.R. Rep. No. 660, 99th Cong., 2d Sess. 22-23 (1986). The House and the Senate both initially considered bills that would have permitted relators to institute actions based on publicly disclosed information after a six-month waiting period, but ultimately rejected this possibility. S. Rep. at 30, 1986 U.S.C.C.A.N. at 5295; H.R. Rep. at 3. It would hardly further Congress' purpose to allow qui tam actions based on information already disclosed in the course of a government audit or one of the other methods identified in the statute merely because the information had not been disclosed to a sufficiently broad segment of the public.

The Ninth Circuit's decision rests on its conclusion that the disclosure of information by the government to employees of defense contractors and subcontractors involves "the release of information within a private sphere" rather

than "publicly." Pet. App. 9a-10a. The Ninth Circuit reasoned that it is "unrealistic" to treat employees of government contractors as "members of the public," since these employees would have a "strong economic incentive" to protect disclosures of wrongdoing from further dissemination. Pet. App. 9a.

These conclusions are baseless. Individuals who happen to be employees of defense contractors or subcontractors do not lose their status as members of the public by virtue of their employment. The Ninth Circuit itself is "unrealistic" in surmising that employees of government contractors have no incentive to act upon information relating to fraud. The qui tam plaintiff in this case was a Hughes employee, and as the reported qui tam cases attest, the most common qui tam plaintiffs are current and former employees of corporations. *See, e.g.*, *United States ex rel. Butler v. Hughes*, 71 F.3d 321 (9th Cir. 1995); *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995 (2nd Cir. 1995); *see generally* John T. Boese, *Civil False Claims and Qui Tam Actions* 4-9 through 4-11 (Supp. 1995).

The Ninth Circuit also objects that if a government disclosure to innocent company employees is interpreted as a public disclosure, then "government possession of information relating to fraud effectively forecloses *qui tam* suits." Pet. App. 10a. This is clearly not the case. Only qui tam lawsuits that are "based upon" government disclosures in an investigation or audit are barred by the statute. And even if a qui tam lawsuit is based upon information disclosed by a government audit or investigation, qui tam plaintiffs who qualify as "original sources" of the information will remain able to prosecute their action.

Amici urge the Court to take this opportunity to resolve one of the most significant disputes concerning the

public disclosure provision by repudiating the Ninth Circuit's position and recognizing, like the Second Circuit, that a government disclosure to any member of the public, including an "innocent" employee of a corporation allegedly involved in misconduct or an employee of a different corporation altogether, constitutes a "public disclosure" sufficient to preclude subsequent qui tam actions based upon that disclosure. *Doe*, 960 F.2d at 322-23.

B. The 1986 Amendment Expanding Qui Tam Liability to Suits Based upon Information Possessed by the Government Cannot Be Applied to Events Completed Before its Enactment.

This Court recently affirmed that "prospectivity remains the appropriate default rule" when Congress has not addressed the temporal reach of a statute. *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1501 (1994). The Ninth Circuit disregarded this "default rule" in holding that the amended version of 31 U.S.C. § 3730(e)(4)(A) applies retroactively to pre-1986 conduct. Pet. App. 5a-7a. That decision creates a conflict with another circuit that will make a company's exposure to the burdens of qui tam litigation turn on the happenstance of where it can be sued. This retroactivity issue is recurring and will continue to be important for the next several years, and the issue therefore warrants this Court's attention in conjunction with the other issues presented here.

The Ninth Circuit reasoned that the Court in *Landgraf* created an "exception to [the] rule [of prospectivity] in the case of jurisdictional statutes," and it divined in this Court's opinion a "strong presumption that jurisdictional statutes apply retrospectively." Pet. App. 6a, 7a. Because the public disclosure provision is phrased in jurisdictional terms, the Ninth Circuit then concluded that it must be

"presume[d]" to apply retroactively and that the presumption was not rebutted because the 1986 provision "does not infringe on the substantive rights of the defendant." *Id.* at 7a.

The Ninth Circuit's analysis misreads *Landgraf*, which in fact reemphasizes the "traditional presumption" that, absent an express Congressional directive, statutes do not "operate retroactively." 114 S. Ct. at 1505. The Court defined the prohibited "retroactive effect" as one that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* Thus, *Landgraf* forbids retroactive or retrospective application of a statutory provision in a way that "attaches new legal consequences to events completed before its enactment." *Id.* at 1499.

The Court in *Landgraf* plainly did not contradict the main thrust of its decision by creating a presumption *in favor of* retroactivity for statutory provisions that can be termed jurisdictional. The aspect of the opinion misinterpreted by the Ninth Circuit was the observation that jurisdictional statutes ordinarily do not have a prohibited "retroactive effect" when applied to prior conduct. This is because they "usually 'take away no substantive right but simply change[] the tribunal that is to hear the case'" and "normally . . . 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Id.* at 1502 (citations omitted).

That observation does not support the decision below because the public disclosure bar, regardless of its label, is not analogous to the "usual" or "normal" jurisdictional provision that speaks only to the "power of the court." Prior to 1986, the False Claims Act barred qui tam suits "based upon evidence or information in the possession of the United States." 31 U.S.C. § 3730(b)(4) (1982). In 1986, Congress

replaced that prohibition with a less restrictive one that permits qui tam actions even if the government possessed the underlying information, as long as there has been no public disclosure. *See* 31 U.S.C. § 3730(e)(4)(A).

The effect of the amendment was to strip contractors of a defense that previously barred many qui tam actions -- namely, that the government possessed the underlying information at the time of filing. As a corollary, the amendment also denied contractors the right to be free from qui tam suits after they voluntarily apprised the government of relevant facts concerning possible violations. In this case, for example, Hughes had informed the government by 1984 about the agreements on which plaintiff Schumer bases this qui tam suit. *See* Pet. App. 48a, 56a. Hughes cooperated with an ensuing government investigation into cost allocation under the agreements, and the government ultimately concluded not only that the agreements were legitimate but also that they had saved the government money. *Id.* at 4a. In these circumstances, Hughes was immune from a qui tam suit under the pre-1986 version of the public disclosure provision, and it should not be exposed to qui tam liability just because Schumer did not bring suit until 1989.

The "jurisdictional" label that is attached to the public disclosure provision does not alter the fact that applying the 1986 amendment to prior conduct both "attaches new legal consequences" to that conduct and "increase[s] a party's liability" for it. *See Landgraf*, 114 S. Ct. at 1499, 1505. In another case, the Sixth Circuit correctly found that the pre-1986 jurisdictional bar continues to apply to prior conduct, noting that application of the 1986 amendment to such conduct would impermissibly "affect the substantive rights of both the qui tam and the government plaintiffs" and "expand the circumstances under which citizens may bring false claims suits." *United States v. TRW, Inc.*, 4 F.3d 417, 422 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1370 (1994). This

Court should act to resolve the resulting conflict in the circuits by correcting the Ninth Circuit's misapplication of *Landgraf*. That action not only will harmonize the law concerning an important provision of the False Claims Act, it also will have the salutary effect of preventing the Ninth Circuit from applying its flawed analysis to approve retroactive application of other statutes that have jurisdictional overtones but nonetheless affect the substantive rights of the parties.

C. The Qui Tam Provisions of the False Claims Act Unconstitutionally Encroach on the Authority and Discretion of the Executive Branch.

The qui tam provisions raise serious constitutional problems under the Appointments Clause, the separation of powers principles established by this Court, and Article III. Although no court of appeals has yet disagreed with the Ninth Circuit's decision upholding those provisions, it is nonetheless appropriate for this Court to review that issue at this time. The explosion of qui tam litigation not only has imposed increasing burdens on litigants, it also has yielded a proliferation of difficult issues on which the courts are in disarray. Many of these issues would be mooted if, as we argue below, the qui tam provisions are unconstitutional. It is therefore desirable for the Court to consider the fundamental constitutional issue at its earliest opportunity.

1. It is beyond dispute that the separation of powers among the three branches lies at the heart of "[t]he structure of our Government as conceived by the Framers of our Constitution." *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). At the core of the Executive power is the responsibility to "take care that the Laws be faithfully executed." Art. II, § 3. "Legislative power, as

distinguished from executive power, is the authority to make laws, *but not to enforce them or appoint the agents charged with the duty of such enforcement*. The latter are executive functions." *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) (emphasis added). This irrefutable principle places the conduct of the government's litigation squarely within the Executive's authority. "A lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley v. Valeo*, 424 U.S. 1, 138 (1976).

The qui tam provisions impermissibly divest the Executive of the most fundamental component of law enforcement authority -- the decision whether to initiate a lawsuit in the first place. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Prosecutorial discretion is a critical government function because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Id.* at 831. In the False Claims Act setting, for example, the government may decide that other available sanctions are a more appropriate means of resolving a perceived problem than a False Claims Act suit, which might interfere with performance of the contract or cause an unacceptable delay in delivery of critical supplies. Or it may determine that, because of national security or other reasons, the public interest would be disserved by a public trial of the matter.

None of these considerations concern the qui tam relator, whose only interest is to pursue its claim in an effort to collect a bounty. Rather, the balancing of such considerations and the initial decision to sue are the Executive's constitutional responsibility; Congress is not free to delegate to the general public the decision to initiate an enforcement action. Moreover, even in those cases in which the Executive believes litigation is appropriate, the qui tam

provisions improperly constrain its right to direct the litigation on behalf of the United States. If the government intervenes in a case, the qui tam plaintiff remains a party -- free to pursue the litigation in parallel with the Department of Justice in a manner that may be inconsistent with the positions and interests of the Executive.

The qui tam provisions interfere with the Executive's prerogatives to a significantly greater extent than does the independent counsel statute upheld by this Court in *Morrison v. Olson*, 487 U.S. 654 (1988). The Court there concluded that several features of the statute "give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." *Id.* at 696. Those features are notably absent from the qui tam provisions of the False Claims Act. In contrast to *Morrison*, the government has *no* control over the commencement of a qui tam suit and no power to circumscribe its jurisdiction or to remove the relator for good cause.

The Ninth Circuit's decision upholding the constitutionality of the qui tam provisions rests in large part on the assertion that the Executive has sufficient control because it "has power, albeit somewhat qualified, to end qui tam litigation." *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 754 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994). But the False Claims Act does not give the Executive Branch any such power. The Act allows the Executive to intervene and seek to dismiss the action, but only after "the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A). Thus, if it wants to dismiss its own claim, just as if it wants to settle (§ 3730(c)(2)(B)), the government is at the mercy of court approval.

As the Ninth Circuit recognized, when the government seeks to dismiss a claim, Congress contemplated an *evidentiary* hearing designed to allow the *court* -- not the Executive -- to determine whether the government has "fully investigated the allegations" or whether dismissal is appropriate in light of the existing evidence. 9 F.3d at 753-54 n.11, quoting S. Rep. No. 345, 99th Cong., 2d Sess. 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291. The Executive's ability to terminate litigation that disserves the interests of the United States therefore is not merely "somewhat qualified"; rather, it is constrained by an unbridled veto power of the trial court that is a significant intrusion into the Executive's constitutional sphere of authority. *See also Gravitt v. General Electric Co.*, 680 F. Supp. 1162, 1164 (S.D. Ohio), *appeal dismissed*, 848 F.2d 190 (6th Cir.), *cert. denied*, 488 U.S. 901 (1988) (court refused to approve Justice Department settlement, noting that the relator's counsel was a "respected . . . member of the bar").

2. By deliberately assigning significant enforcement authority to private citizens, Congress violated not only the basic constitutional separation of powers structure but also the specific injunction of the Appointments Clause, art. II, § 2, cl. 2. In representing the interests of the United States in civil enforcement litigation, the qui tam relator acts as an "Officer of the United States" -- a position that constitutionally can be held only by an Executive Branch appointee. *See Buckley v. Valeo*, 424 U.S. at 140.

3. A qui tam relator lacks standing under Article III of the Constitution to bring an action alleging fraud claims on behalf of the United States, because a relator has suffered no personal "injury in fact" and cannot receive "redress" but only a share of the amount the United States recovers for its injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APRIL 1996